Supreme Court, U. S.
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No. 75-1280

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALEXANDER J. BARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

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Our memorandum in response to the petition in this case suggested that the Court should grant certiorari in order to resolve a jurisdictional problem of substantial practical importance. We added the caveat (Mem. 18 n.19) that the Court might instead wish to grant only the petition in *Abney* v. *United States*, No. 75-6521, which also presents the issue whether an order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial. The petition in *Abney* was granted on June 14, 1976, and we submit that by virtue of that action there is no longer any reason either to grant the petition in this case or to hold it pending a decision in *Abney*. The instant petition should be denied so that this case may proceed to trial without further delay.

However this Court may decide the jurisdictional question in *Abney*, petitioner will derive no benefit. The court of appeals entertained petitioner's double jeopardy and collateral estoppel claims on the merits and rejected them. As we have argued in our initial response to the petition (Mem. 14-17), those claims are insubstantial and would not warrant consideration by this Court even if there were jurisdiction to do so. On the other hand, if there is no jurisdiction, petitioner could gain nothing from an order directing the court of appeals to vacate its judgment, for petitioner's trial still would go forward.

We do not believe that petitioner's trial should be further delayed while the Court considers *Abney*. Accordingly, we believe that it now would be appropriate for the Court to consider the petition as if petitioner's double jeopardy claim were the only issue involved, and to grant or deny it on that basis. If, contrary to our submission, the Court should conclude that the double jeopardy claim itself warrants review, this case can be briefed on that issue alone and either decided on the merits or vacated, depending upon the Court's decision in *Abney*. If the Court agrees with us that the claim does not merit further review, the petition should be promptly denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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Assistant Attorney General.

SHIRLEY BACCUS-LOBEL,
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JULY 1976.